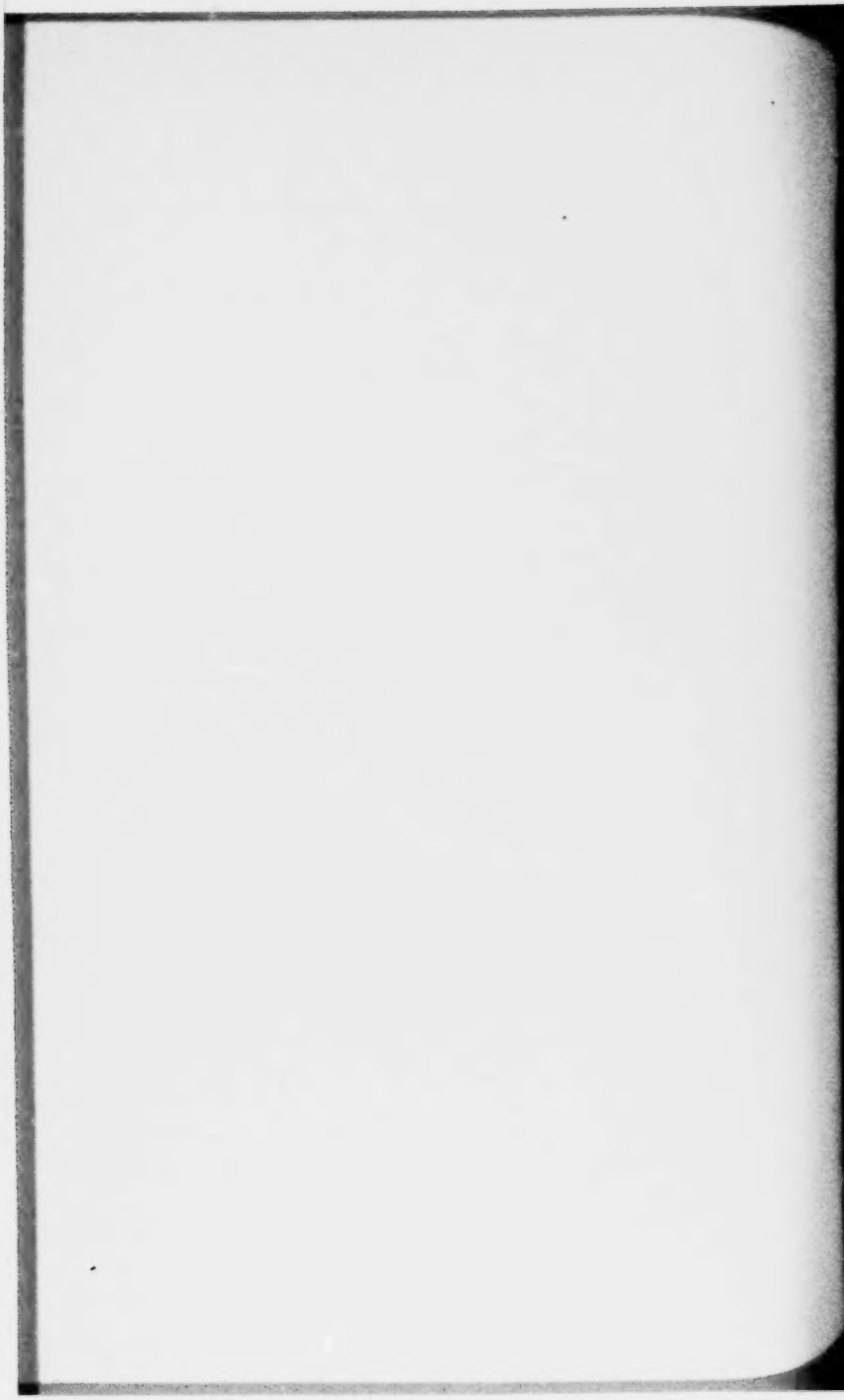

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 531

GENEVIEVE A. CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the District Court (R. 99–108) nor those in the Circuit Court of Appeals (majority, R. 121–145; dissenting R. 145–164) have yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 25, 1932. (R. 164.) The petition for certiorari was filed November 28, 1932. While she does not so state, petitioner presumably

invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the trial court denied petitioner due process by proceeding to trial on the return day of the rule to show cause why she should not be adjudged in contempt.

2. Whether the petition for the rule sufficiently apprised the petitioner herein of the charge upon which she was subsequently convicted.

3. Whether petitioner's responses to certain questions asked her by the trial court in her examination on the *voir dire* touching her qualifications as juror in a criminal trial constituted criminal contempt.

4. Whether the testimony of petitioner's fellow jurors concerning her utterances and actions during their deliberations after the case had been submitted to them was erroneously admitted in evidence.

5. If so, whether there was sufficient evidence outside of this testimony to warrant conviction.

6. If there was sufficient evidence outside of such testimony to warrant conviction, whether the conviction must nevertheless be reversed because of the admission of this testimony, even though the case was tried to the court without a jury.

STATUTE INVOLVED

Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385) provides:

> The said courts [courts of the United States] shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

On November 4, 1931, the Government filed in the United States District Court for the District of Minnesota a petition (R. 1–6), which alleged that on September 1, 1931, there came on for trial in that court an indictment which had been returned against one Wilbur B. Foshay and others charging them with the use of the mails in furtherance of a scheme to defraud (R. 1–2). According to this petition the petitioner herein (hereinafter called the defendant) was one of the jury panel sum-

moned in connection with this trial. (R. 2.) When she was called for examination on her *voir dire* she took the following oath: "You do solemnly swear that you will true answers make to such questions as may be put to you touching upon your qualifications and competency to sit as a juror in this case." (R. 2, 146.) A number of questions were then asked her by the United States District Judge who presided at the trial. (R. 3.) These questions and the defendant's answers are set forth verbatim at R. 16–18 and also in the dissenting opinion at R. 146–147. The petition alleged that there were, among others, five topics of inquiry which had a material bearing upon the defendant's qualifications and competency to sit as a juror. (R. 2–3.) It then gave a detailed summary of defendant's answers upon these subjects (R. 3) and alleged that these answers were not in accord with the truth in certain particulars (R. 3–4). The petition concluded with the prayer that the defendant be required "to appear in this Court in person at a day certain and show cause why she should not be held in contempt * * * in consequence of her said contemptuous and obstructive conduct, and punished by fine or imprisonment as for criminal contempt." (R. 5.)

A rule to show cause was issued in response to this petition. (R. 6.) The rule was dated the same day that the petition was filed, and directed the defendant to "appear in person and show cause,

before this Court, if any she has, on the 9th day of November, A. D. 1931, at ten o'clock A. M., or as soon thereafter as the matter may be heard, why she should not be adjudged in contempt of the authority of this Court as prayed in said petition." It also directed that a certified copy of the petition and of the rule be served upon the defendant on or before November 6, 1931. The rule was served on the day it was issued, November 4, 1931 (R. 10), and, together with the Marshal's return showing that he had served the writ, was filed in the District Court on November 6, 1931. (R. 6.)

In response to the rule to show cause the defendant on November 9, 1931, filed an answer (R. 6–10), which, among other things, denied that any answer or answers made by her upon her *voir dire* examination impeded or obstructed the due administration of justice in the selection of the jury, or otherwise, in the Foshay trial (R. 9).

The proceeding came on for hearing on November 9, 1931, before a court composed of two district judges (District Judge Nordbye and District Judge, afterward Circuit Judge, Sanborn, neither of whom had presided at the Foshay trial). While counsel for the defendant was willing to proceed with the hearing if it involved merely the examination of the defendant, he objected to a general trial of the issues in controversy on the ground that the time which had elapsed since the service of the rule to show cause

had been devoted to the preparation of the defendant's answer and that he had had insufficient opportunity to prepare for an extended trial. The court ruled, however, that the Government should proceed with its evidence, as a continuance at that time would not be of much avail to the defendant, and that if it should appear that the defendant needed further time when the Government had concluded its evidence, the matter of continuance would then be given consideration. To this ruling defendant noted an exception. (R. 12.)

The Government then proceeded with its evidence. Most of the Government's witnesses were subjected to vigorous cross-examination by defendant's counsel. (R. 13–58.) The Government's testimony apparently consumed the morning of November 9th, because after the Government had rested the defendant's counsel stated (R. 58): "I repeat what I said this morning. I have not had adequate time to prepare this case, and I would like time to present the respondent's case." In response to this request the court continued the matter until November 19th. The court also said that it was "particularly interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary to the defense to properly present such additional facts that the Court should have." (R. 59.)

Pursuant to the court's order the matter again came on for hearing on November 19th. No request for a further continuance was made on behalf of defendant, and her counsel proceeded with the introduction of evidence for the defense. (R. 59–90.) The defendant took the stand in her own behalf and was given full opportunity to explain her conduct dealt with in the charges which had been made against her. (R. 62–90.) After the defendant had rested the Government introduced the testimony of several witnesses in rebuttal. (R. 90–96.)

Certain motions were then interposed by the defendant and taken under advisement. The arguments by counsel followed, and the proceeding was adjourned until December 26, 1931, at which time the court filed its findings and conclusions (R. 99–108) and pronounced its sentence (R. 98). The court found the defendant guilty of contemptuous conduct with respect to two of the subjects of inquiry in her examination upon the *voir dire* and sentenced her to imprisonment in a county jail for a period of six months and to pay a fine of $1,000.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment finding the defendant guilty of contempt was affirmed, but the sentence was set aside and the case remanded for resentencing on the ground that Section 268 of the Judicial Code (*supra,* p. 3) made provision for

fine *or* imprisonment only (R. 121–145, 165). Circuit Judge Gardner dissented. (R. 145–164.)

As the courts below held that the defendant's conduct was contemptuous in respect of only two of the matters under inquiry when she was examined by the District Judge on her *voir dire,* we will discuss the evidence and findings of the District Court only in so far as they bear upon those two matters. The portion of the questions and answers at that examination upon which her conviction was based are as follows (R. 17, 18):

> (1) Q. Have you yourself ever been in any business of any kind?
>
> A. I have been a stenographer before my marriage, yes.
>
> Q. In what kind of business did you work?
>
> A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency.
>
> * * * * *
>
> (2) Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other?
>
> A. Yes, I do feel that way.
>
> Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?
>
> A. Yes; I do.

According to the findings of the District Court, as supplemented by the evidence wherever such evidence tends to throw additional light upon the pertinent facts, the defendant was at all the times here material a resident of Minneapolis, Minnesota, and the wife of D. D. Clark. On August 24, 1931, she received a summons to report as a juror on September 1, 1931, at the Federal building at Minneapolis. The jurors who were summoned to report on that day were all called in connection with the trial of the *Foshay case*. At the time she received this summons it does not appear that she knew for what case she had been called. (R. 99.) She testified that shortly after receiving the summons she called up her sister, a Mrs. Brown, who was a clerk in the Naturalization Service and had an office in the Federal building in St. Paul (R. 61) and told her of having received the summons (R. 63). Her sister asked her if she was glad to receive the summons and she replied, "Yes," but that she was sorry it had come at that time, as she was " halfway " expecting a guest to be with her in the first week of September. (R. 61, 63.) She appears also to have asked this sister whether there was any way she could get a postponement or be excused. (R. 61.) In a subsequent telephone conversation the defendant's sister advised her that she had been to the office of the District Court clerk and had been told that it would be necessary for the defendant to appear in court on September

1st if she wished to ask to be excused (R. 61, 63, 99), but she did not make any such request when she appeared at the Federal Court in response to the summons. (R. 84.) Her sister further informed her that the trial for which she had been summoned was the Foshay trial and that she would probably be disqualified, as she had been employed by the Foshay Company. (R. 61–62, 99–100.) Her sister testified that defendant was also of the same opinion (R. 62), although at the hearing the latter denied that she had any recollection of talking with her sister on the question of her disqualification (R. 72).

The defendant appeared at the court room on the morning of September 1st. (R. 100.) The examination of the jurors as to their qualifications was conducted by District Judge Molyneaux, who presided at the Foshay trial. (R. 63, 100.) The District Court found that while the jury was being drawn, and prior to her examination, the defendant made the statement to several other women on the panel that she wished to serve on the jury, that she had a special reason for wanting to be on the jury, and that she was afraid that her former employment by the Foshay Company would disqualify her. (R. 100.) While she does not appear to have advised these women of the reason why she particularly wished to be on the jury, one of them testified that she said "she was simply praying to serve as a juror in that particular case." (R. 13.) She told one of

these women that she had done stenographic work for the Foshay Company for about two weeks after she was married (R. 1[illegible], and in her testimony she admitted that she had worked for the Foshay Company since her marriage but stated that she was employed as a typist for a period of about ten days to do temporary work (R. 65–66). Although the defendant denied that she had told anybody on the jury panel that her employment with the Foshays would probably disqualify her (R. 72), the Government offered in rebuttal a witness who testified that she had also been called on the jury panel and that the defendant had told her that she would like to serve on the jury but "thought probably she would not be accepted" on account of "working for the Foshays." (R. 91.)

Although but a few hours earlier the defendant had talked with three people relative to her employment with the Foshay Company subsequent to her marriage, and had expressed concern to two of them that such employment would probably disqualify her from serving on the jury, she failed to mention the fact that she had worked for the Foshays when the Judge asked her, "Have you yourself ever been in business of any kind?" contenting herself with the answer, "I have been a stenographer before my marriage." The only attempted explanation of this appearing in defendant's testimony, besides the fact that she was extremely nervous when she appeared in court, her previous court experience having been limited to

a traffic court (R. 63), was that her answer was thus limited to employment *before* her marriage "because all the employment that I had had after my marriage lasted only two or three days or a couple of weeks at the most." (R. 77.) However, in response to the next question of the court, "In what kind of business did you work?" she enumerated, among other things, her employment with an automobile concern, a Nash agency, despite the fact, as she admitted in her testimony, that this employment, like the Foshay employment, occurred after her marriage and lasted about the same length of time. (R. 78.) According to the defendant she first thought of the matter of her employment by the Foshay Company the evening of her examination, but decided not to speak to the Judge about it because she did not regard the matter as important. (R. 67.)

Mrs. Clark, the only woman upon the jury, was the twelfth juror to be accepted. (R. 101.) The jury was then sworn and placed in the custody of a United States Marshal, and throughout the trial, which lasted approximately eight weeks, was in the charge of two officers, one a woman and the other a man. (R. 101.) The jury was out for approximately a week after the case was submitted to them, and when discharged stood eleven for conviction and one (Mrs. Clark) for acquittal. (R. 102.)

Coming now to the findings and evidence relating particularly to the defendant's answers to the questions on her *voir dire* examination relating to bias, the District Court found that during the first week

of the trial she made the remark to several of the jurors, on one occasion, that she regarded Mr. Foshay as a victim of circumstances; that he had gone to New York in the fall of 1929 to borrow $18,000,000, but that, because of the stock market crash, had come back without a dollar. (R. 101.) When asked by one of the jurors where she had procured that information (which concededly was not based upon any evidence in the case) she said that she had read it in the newspapers, but recalled it only after she was sworn. (R. 22, 28, 30, 32, 101.) In the course of her testimony the defendant admitted that she had made all of these statements, except the one that Foshay was a victim of circumstances; that they were not based on any evidence in the case; and that the only foundation for them was "common talk." (R. 78, 89–90.) She said that she did not remember making the statement that Foshay was a victim of circumstances. (R. 90.)

Also, according to several of the jurors, she at one time prior to the submission of the case, expressed dissatisfaction with the Government because of the way the soldiers were treated after the war. (R. 26, 31.) This was denied by the defendant. (R. 90.)

After the case had been submitted to the jury and during its deliberations, the defendant announced that since the prosecuting attorney, whom she regarded as a very brilliant lawyer, had been unable to convince her of the guilt of the defend-

ants in the case under trial, the other jurors could hardly be expected to do so. (R. 24, 101.)

One of the jurors testified that during an argument in the jury room he called the defendant's attention to the so-called $18,000,000 loan arrangement and asked the defendant whether, if the court should call the jury in for the purpose of asking "why we had not been able to agree," she wished him to tell the Judge that "she believes that Mr. Foshay was a victim of circumstances" and also about the loan arrangement, and she said, "No, I hope you will have more sense than that." (R. 24.)

One of the witnesses for the Government was a man named Coble, an accountant, and while the jury were looking over some charts prepared by him the defendant, according to several of the jurors, said she "would like to choke" Coble; that "he, on some trial in the south, on his testimony, had very nearly convicted a man but the jury had found him innocent, and that his wife's hair had turned gray, and she later died; that his son contracted t. b. and was dying, and when his son died he was going to kill Coble." (R. 25, 27, 31–32.) These statements about Coble, the court found, were obviously based upon information given to the defendant after the trial commenced by her husband, who, apparently without authority from the trial Judge (R. 40), was permitted by some one to visit her about once a week during the trial and converse with her, supposedly in the hearing of the woman bailiff. This information con-

veyed by him to his wife he had received from a Miss Todd, who was connected with the firm to which the defendant's husband belonged, and who had expressed her opinion about Coble to Mr. Clark upon seeing Coble's picture in the newspaper during the Foshay trial. Miss Todd had recognized him from this picture as being the accountant who had testified in a fraud case in Kansas City in which she at one time had been interested. (R. 37–38, 101–102.)

In explanation of her statements about Coble, defendant testified that she did not know of any particular previous case in which Coble had testified, but said that years ago she had "heard of a case where a witness had testified and made a case appear black, and that I was wondering whether the two witnesses were not the same. It was merely a case of thinking out loud, that is all—that I wondered if the two witnesses had not been the same"; that she merely spoke of the matter "in the heat of battle, for the sake of argument, that's all." (R. 80.)

The defendant stated in the jury room that she could not vote to send the seven Foshay defendants to the penitentiary "because it would bother her the rest of her life, if she lived to be a hundred years old," and also expressed the wish that she might consult with her husband and secure his advice as to "how he would vote." (R. 25, 28, 30, 31, 102.)

One of the jurors testified as to defendant's attitude during the deliberations of the jury as follows (R. 25):

> Well, at different times arguments would start, and Mrs. Clark did not seem to be interested—was not listening. Some times she held her hands up over her ears, and it was hard to argue with any one that won't reply. * * * She said that it was getting pretty dry there; she thought she would bring a book, one afternoon, * * *.

Another one testified that "her attitude was very much one-sided all the way." (R. 27.)

After the Foshay jury had been discharged the defendant was visited by a group of Federal investigators, to whom, upon their request, she gave a voluntary statement. (R. 69–70.) This statement did not accord in some respects with her testimony at the trial. For example, she stated to the Federal investigators, in response to one of their questions, that she did not know she was on the Foshay jury until she got in the jury room. (R. 69, 83; *cf.* testimony, pp. 9–11, *supra.*) Her explanation of the variance between this answer and her subsequent testimony was that she was trying to "shield" some one in the office of the District Court Clerk. (R. 69.)

There is little, if any, evidence in the record as to what motivated the defendant's misleading and false answers to the questions propounded to her by the District Judge. While her husband, when president of a bank in St. Paul, had

had certain difficulties with the State Banking Department, and while he had, some five or six years before the Foshay trial, been indicted for perjury, apparently in a State court (R. 88), there does not appear to be any testimony indicating that either he or she had had any difficulties with the Federal authorities. While her husband, as president of the St. Paul bank, had had certain business transactions with the Foshay Company, the testimony does not indicate that she knew of these transactions or was in fact acquainted with any of the defendants in the Foshay case. (R. 67, 86–87.) The defendant had attended high school and business college (R. 17–18) and had some limited bookkeeping experience (R. 18). Before her marriage she was employed as a stenographer at her husband's bank (R. 75), and she testified that she wrote all the insurance of the bank (R. 65, 76); that she did some work in the real-estate department of the bank; that during rush hours she helped in the teller's cage (R. 65), and that she was given the title of assistant cashier so that she could sign checks and drafts during the absence of the other officers. (R. 65.) After her marriage she continued working at the bank for a short time (R. 65), and later worked as a stenographer or typist for a Nash automobile agency, the Foshay Company, and a public stenographer (R. 65, 77–78).

ARGUMENT

I

It is contended by the defendant that the trial court denied her due process of law by proceeding to trial on the return day of the rule to show cause. She asserts that the rule did not apprise her that a trial would be had on the return day and that a large number of witnesses would then be examined on behalf of the Government, and that an insufficient time elapsed between the service of the rule and the return day to permit her to prepare for trial.

The rule was dated November 4, 1931 (R. 6), and was served upon the defendant the same day (R. 10). It specifically directed the defendant "to appear *in person* and show cause, * * * if any she has, on the 9th day of November, A. D. 1931, at 10 o'clock A. M., * * * why she should not be adjudged in contempt of the authority of this Court as prayed in said petition." (Italics ours.) The case came on for hearing on the return day before a court of two judges, neither of whom had sat in the trial of the case out of which the contempt proceeding grew. While the defendant then filed an answer which showed that she comprehended fully what the issues in controversy were (R. 6–10), her counsel requested that the hearing be continued if it should involve anything more than an examination of the defendant personally (R. 10–12). Although the court denied this request and directed the Government to proceed with the examination of

its witnesses (R. 12), it said that if it should appear, after the Government had introduced its evidence, that the defendant "should have further opportunity to meet any evidence presented by the Government in support of this petition, we would be very glad to hear you further on it, and pass upon that question at that time" (R. 12).

Presumably the basis of the court's ruling was that the Government's evidence might not be sufficient to make out a case, so that a continuance at that time might operate merely to delay the disposition of the proceeding. That the defendant was not embarrassed by the denial of a continuance at this stage of the proceeding is evident from the fact that a number of the witnesses called by the Government were subjected to vigorous cross-examination. (R. 13, 20, 29, 32, 38, 43, 45.)

After the Government had rested, counsel for the defendant repeated his request for a continuance (R. 58) and the court ordered that the case stand adjourned until November 19, a period of ten days. It stated in this connection that "we have assured Mr. Ueland [counsel for the defendant] that the Court is particularly interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary for the defense to properly present such additional facts that the Court should

have." (R. 59.) The time allotted was evidently satisfactory to counsel for the defense because no exception was taken to the court's ruling and no further continuance was requested when the court re-convened on November 19, counsel proceeding immediately with the introduction of testimony for the defense. (R. 59.)

The granting of a continuance is ordinarily a matter within the sound discretion of the trial court. Under all the circumstances there was, we submit, no such abuse of discretion in denying a continuance on the return day as would amount to a denial of due process. Cf. *Cooke* v. *United States,* 267 U. S. 517, 537.

II

The second contention urged by the defendant is that she was denied due process because being charged with perjury as contempt she was convicted of withholding information when examined on her *voir dire.*

But the trial court found that the defendant was guilty of contempt, in connection with her examination on the *voir dire,* because she had obstructed the administration of justice in two respects: (1) By deliberately and intentionally concealing her employment by the Foshay Company; (2) by falsely answering questions regarding her freedom from bias and intention to follow the testimony and law in rendering her verdict. These findings were sustained by the Circuit Court of Appeals after a review of the evidence. If supported

by competent and substantial evidence, they are of course conclusive. *Bessette* v. *W. B. Conkey Company,* 194 U. S. 324, 338; cf. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441. As the defendant's contention applies to only one of the grounds upon which she was convicted, it is evident that her conviction must stand regardless of the merits of such contention.

The basis for petitioner's contention that she was being charged with one contempt and convicted of another arises from the fact that the petition for the rule to show cause characterized her answers with respect to the questions asked her concerning her employment as "wilful and corrupt perjury" (R. 5), whereas the conviction in the trial court upon this charge rested upon that court's finding that she had "deliberately and intentionally concealed her association with the Foshay Company when she was examined by the Court" (R. 105), which both courts below assumed did not amount to perjury as defined in the statute covering that offense. (R. 106, 128.)

The difficulty with this argument is that it confuses the gist of the offense with which the defendant was charged. She was not indicted for perjury, but was charged with criminal contempt, and, as was succinctly stated by the court below (R. 128), "the gist of criminal contempt is the obstruction of the administration of justice. The gist of perjury is falsification under oath." (R. 128.) While perjury may amount to contempt, if the ob-

structive element is present (*Ex parte Hudgings,* 249 U. S. 378), the point at issue is not whether perjury has technically been committed but whether the tendency of the testimony is to obstruct the performance by the court of its judicial duty. If the testimony has that tendency, obviously it constitutes a criminal contempt, even though all the elements of perjury may not be present. See *People ex rel. Nunns* v. *County Court,* 188 App. Div. (N. Y.), 424, 442; *Young* v. *State,* 198 Ind. 629, 632. That the pleader may call it perjury does not alter the essential nature of the charge, and his characterization may clearly be disregarded as immaterial.

Looking at the petition for the rule to show cause in the light of these principles, we submit that it adequately informed the defendant that she was charged with having concealed her employment with the Foshay Company from the court. It specifically pointed out that in determining the defendant's qualifications as a juror it became material to ascertain whether she had "ever been employed in any business, and if so, when." (R. 2.) It then proceeded, inartistically, but, we think adequately, to call attention to the defendant's answers in respect to the matter of employment. (R. 3.) It followed this by the allegation that—

> it was not and is not true and at the time of so swearing and deposing the said Genevieve A. Clark did not believe it to be true that she, the said Genevieve A. Clark, had

> been in business but that was before she was married and that she had been a stenographer working as such in the banking, insurance and real estate business and with a Nash automobile agency, and that it was true that since her said marriage she was employed by the said Citizens State Bank of St. Paul, and other concerns, and as late as July, 1929, was employed by the said *W. B. Foshay Company,* a corporation. (Italics ours.)

And it concluded with the prayer that the defendant be required to appear and show cause why she should not be held in contempt "in consequence of her said contemptuous and obstructive conduct."

That the defendant knew that she was being called to account for failing to disclose her employment by the Foshay Company is evident from her answer, in which she points out the specific questions and answers relating to the matter of employment and endeavors to justify her failure to disclose her employment by the Foshay Company. (R. 8–9.) Likewise, much of her testimony upon direct examination is devoted to the same purpose. (R. 65–67.) The defendant did not ask for a bill of particulars and the record does not disclose that she was in any way embarrassed in making her defense. It is well settled that a proceeding to punish contempt is not in all of its characteristics a criminal prosecution and therefore the technical accuracy of an indictment is not required in charging a contempt. Due process is not denied if the de-

fendant is fairly apprised of the nature of the contempt with which he is charged. In determining this it has been held that the entire record may be examined. See *Blackmer* v. *United States,* 284 U. S. 421, 440; 49 F. (2d) 523, 529 (App. D. C.); *Sinclair* v. *United States,* 279 U. S. 749; *Cooke* v. *United States,* 267 U. S. 517, 537; *Ex parte Grossman,* 267 U. S. 87, 117; *Myers* v. *United States,* 264 U. S. 95, 103; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, *supra; McGovern* v. *United States* (C. C. A. 2d), decided August 30, 1932, not yet reported, certiorari denied Oct. 24, 1932, No. 392; *Conley* v. *United States,* 59 F. (2d) 929 (C. C. A. 8th); *Kubik* v. *United States,* 57 F. (2d) 477 (C. C. A. 8th); *Lang* v. *United States,* 55 F. (2d) 922 (C. C. A. 2d), certiorari dismissed as improvidently granted, 286 U. S. 523; *Armstrong* v. *United States,* 18 F. (2d) 371, 372 (C. C. A. 7th), certiorari denied, 275 U. S. 534; *Schwartz* v. *United States,* 217 Fed. 866 (C. C. A. 4th).

III

Several of the points urged by the defendant relate to the question whether the testimony upon her *voir dire* examination which formed the basis of her conviction constituted criminal contempt.

She first contends that she was not guilty of contempt in connection with her failure to disclose her employment with the Foshay Company because she was not required to volunteer such information, her

oath merely requiring her to make true answers "to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on the said trial." (R. 2.) But, as the trial court pointed out (R. 105–106):

> It is true that the question asked her as to her employment did not specifically call for that information, but her deceiving answers to the Court's question disarmed the Court. She purposely implied in her answers to the Court's questions that her employment as a stenographer was limited to the period prior to her marriage. It is significant that she mentioned her employment with the Nash agency, which employment was after her marriage and continued for a period of but a few days, but purposely withheld from the Court her employment after her marriage with the Foshay Company. It is our opinion that the Court's question to Mrs. Clark at the time she was examined as a prospective juror fairly required her to disclose her employment with the Foshay Company, and she was given a full opportunity to do so. Her failure to make the disclosure and her cunningly framed answers constituted an intentional concealment of a material matter.

The court below also treated this concealment as contemptuous. (R. 107.)

The record discloses that the defendant is a woman of intelligence and business experience. That she realized the important bearing which her

employment by the Foshay Company had upon her qualifications as a juror is evident from the conversations which she had with other prospective jurors shortly before she was sworn. See p. 10, *supra*. It is also significant that on the night of her examination she was, according to her testimony, sufficiently disturbed by her concealment of such employment as to give serious consideration to the question whether she should report the matter to the judge on the following day. (R. 67.) If the defendant had desired to be candid she would not have relied on the mere form of the questions put to her by the trial judge as justifying her failure to disclose facts which she had previously considered as a possible basis for her disqualification. The questions put to her were sufficiently provocative to have elicited from a person who had nothing to conceal information which one of defendant's intelligence would recognize as material.

The defendant also contends that however obstructive to the administration of justice the testimony in question may have been, it did not constitute criminal contempt because it did not in any way interfere with "order and decorum in the court room." Of course, anything that disturbs order and decorum in the court room is contempt, but that is because of its obstructive character. Both courts below considered defendant's concealment of material facts as sufficiently obstructive of justice to constitute contempt. We have found no case, and the defendant cites none, which may be

construed as holding that conduct like defendant's, although involving no physical affront to the dignity of the court, may not constitute a criminal contempt. As was said in the *Hudgings case, supra,* p. 383, "an obstruction to the performance of judicial duty resulting from an act done in the presence of the court is * * * the characteristic upon which the power to punish for contempt must rest." See also *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402.

The defendant further contends that it was not proved beyond a reasonable doubt that she answered falsely the questions put to her in respect of her freedom from bias. But the trial court recognized that the onus was upon the Government to establish its charges beyond a reasonable doubt (R. 103), and it specifically found, after reviewing the evidence bearing upon the question of bias, that there was no reasonable doubt that the defendant's answers in regard thereto were false and untrue. (R. 107.) That there was substantial and competent evidence to support this finding is apparent from the evidence reviewed at pp. 9–17, *supra.* The finding is therefore binding in an appellate court. See *Bessette* v. *W. B. Conkey Co., supra;* cf. *Gompers* v. *Bucks Stove & Range Co., supra.*

The defendant relies upon the rule in perjury cases, announced in *Hammer* v. *United States,* 271 U. S. 620, 626, that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused," and asserts that in

the instant case her contention was based wholly upon circumstantial evidence. But, as we have heretofore pointed out (p. 21, *supra*), this is a prosecution for criminal contempt and not for perjury. The rule to which the defendant refers consequently does not apply.

IV

It is next contended by the defendant that the trial court erred in receiving in evidence the testimony of the defendant's fellow jurors concerning her actions and utterances in the jury room after the case had been submitted to them. This testimony had a bearing upon the state of mind of the defendant when she was interrogated upon the *voir dire* as to her freedom from bias.

After an exhaustive review of the authorities (R. 137–142), including those cited by the defendant in her petition for certiorari, the court below reached the conclusion that the testimony in question was admissible, saying (R. 141):

> The special divinity which surrounds the deliberations of a jury is only so far as the protection of the verdict is concerned. If one juror should bribe the balance of the jury to return a verdict would any court assert that there was no power to show this by the statements of another juror as to what the briber had said. If a juror should present to the jury affidavits of alleged facts which should properly have been a matter

> of testimony is a court powerless to rectify the wrong which might thus be perpetrated? Must a court sit supinely and spinelessly and permit such misconduct in a juror because of the fine distinction to be drawn that while a court may receive such evidence to show misconduct of a juror in acts, it has no power to do so as to utterances when the acts can only be shown by the utterances. It would carry the doctrine of privilege to absurd results to so hold.

The court then refers to the decision of this Court in *McDonald* v. *Pless,* 238 U. S. 264, where it was held that the testimony of a juror may not be received to prove the misconduct of himself or his colleagues in reaching a verdict, but in which this Court said (p. 269):

> The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

The court said that this excerpt was "significant and fits the situation in this case," because (R. 142):

> There is no question here of impeaching the verdict of a jury. The question is the misconduct of one chosen as a juror. It would seem that if misconduct of a juror in

> a jury room could be shown by the testimony of other jurors for the purpose of punishing such misconduct that it could be shown for the purpose of its probative force, and that is the situation here. The testimony admitted of other jurors as to the statements and conduct of appellant in the jury room were admissible as bearing on the question of the falsity of answers given by her on the *voir dire* examination. No public policy requires the proceedings in the jury room to be kept secret under the circumstances here presented.

We deem it unnecessary to attempt to add anything to what the court below has said on the question of the admissibility of this testimony, because the court below correctly held that there was sufficient evidence without it to justify the finding of the trial court that the defendant was guilty of criminal contempt in falsely answering the question as to her freedom from bias. Indeed, the opinion of the trial court discloses that it gave little, if any, consideration to what the defendant said or did after the jury had retired for its deliberations. That court said in this connection (R. 106–107):

> * * * it is our opinion that Mrs. Clark purposely withheld information from the Court so as to be accepted as a juror. Her remarks to her fellow prospective jurors as to her desire to be accepted on the panel and that she had a special purpose in mind, may without any other circumstances, be quite consistent with an honest rather than a

wicked intent. Her studied attempt, however, to get on the jury, her evasive and incomplete answers, coupled with her conduct after she was accepted, convince us that her mind was prejudiced by some person, or for some reason, before she took her oath as a juror. In light of all the circumstances as developed by the evidence, it is inconceivable that a woman with an honest intention at the outset would endeavor to influence her fellow jurors during the first week of their service with a statement regarding Mr. Foshay being a victim of circumstances. There was an utter absence of any testimony that would prompt such a statement, and while it may be a fact that she was improperly influenced after the trial commenced, she herself contends that no one communicated any information to her regarding the facts, or that any outsider endeavored to influence her after she was accepted as a juror. If her story is true regarding the absence of any outside influence, there can be no serious question but that her mind was not free and open when she was accepted as a juror, and her answers to the Court in regard thereto were false and untrue. Such false answers obstructed the Court in the performance of its duty and constituted contempt.

In addition to the testimony referred to by the trial court, the record shows that several of the jurors testified that on one occasion before they retired the defendant stated that she did not have

any use for the Government because they had not treated the soldiers right when they came back from the war. (R. 26, 31.) It is evident, therefore, that there was substantial evidence outside of that which related to the defendant's utterances and actions during the deliberations of the jury to warrant the finding of the trial court that she was not free from bias when she was examined on her *voir dire*.

Even if, as the defendant contends, the testimony relating to her actions and utterances in the jury room should not have been admitted, it does not follow that her conviction must be reversed, there being sufficient other evidence to support the conviction. As was said in *Sinclair* v. *United States*, 279 U. S. 749, 767, *supra:*

> Objections are offered to the admission of certain evidence. In answer, we need only refer to what was said in *The United States* v. *King*, 7 How. 833, 854, 855: "In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the cause as if it was not in the record."

CONCLUSION

The defendant was accorded a fair trial. The evidence of her guilt is clear and has been held sufficient in two Courts. No questions of law deserving of review in this Court are presented. Only the finding of facts and the application of settled principles of law to the facts found are involved. The petition should accordingly be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 531

GENEVIEVE A. CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 99–108) is reported in 1 F. Supp. 747. The majority (R. 121–145) and the dissenting (R. 145–164) opinions of the Circuit Court of Appeals are reported in 61 F. (2d) 695.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 25, 1932. (R. 164.) The petition for certiorari was filed November 28, 1932, and granted January 9, 1933. (R. 167.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the trial court denied petitioner due process by proceeding to trial on the return day of the rule to show cause why she should not be adjudged in contempt.

2. Whether petitioner was convicted of a contempt with which she was not charged, and, if so, whether the judgment of conviction must be reversed.

3. Whether petitioner's concealment of her employment by the Foshay Company constituted contempt.

4. Whether petitioner's other conduct constituted criminal contempt.

5. Whether the evidence showed beyond a reasonable doubt that petitioner answered falsely the questions asked her in her examination on the *voir dire* in respect of her freedom from bias.

6. Whether the rule as to the quality of proof in perjury cases is applicable.

7. Whether the testimony of petitioner's fellow jurors concerning her utterances and actions during their deliberations after the case had been submitted to them was erroneously admitted in evidence.

8. Whether the contempt was purged by petitioner's sworn answer and testimony.

STATUTE INVOLVED

Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385) provides:

> The said courts [courts of the United States] shall have power to impose and adminster all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

On November 4, 1931, the Government filed in the United States District Court for the District of Minnesota a petition for a rule to show cause why the petitioner herein (hereinafter sometimes called the defendant) should not be punished for criminal contempt. This petition alleged that on September 1, 1931, there came on for trial in that court an indictment which had been returned against one Wilbur B. Foshay and others charging them with the use of the mails in furtherance of a scheme to defraud. (R. 1–2.) The defendant in the instant proceeding was one of the jury panel summoned in connection with that trial. (R. 2.) When called for examination on her *voir dire* she took the oath

that she would true answers make to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on such trial.[1] (R. 2.) A number of questions were then asked her by the District Judge who presided at the trial. (R. 3.) These questions and the defendant's answers are set forth verbatim at R. 16–18 and also in the dissenting opinion at R. 146–147. The petition then enumerated five of the topics of inquiry which had a material bearing upon the defendant's qualifications and competency to sit as a juror (R. 2–3), and gave a detailed summary of defendant's answers upon these subjects (R. 3). It alleged that these answers were knowingly false in certain particulars (R. 3–4), and that the due administration of justice, in the selection of a jury, and in the trial of said criminal case was in fact thereby corruptly and unlawfully impeded. (R. 5.) The petition concluded with the prayer that the defendant be required—

> to appear in this Court in person at a day certain and show cause why she should not be held in contempt * * * in consequence of her said contemptuous and obstructive conduct, and punished by fine or imprisonment as for criminal contempt. (R. 5.)

---

[1] The exact language of the oath was stated in the dissenting opinion to be: "You do solemnly swear that you will true answers make to such questions as may be put to you touching upon your qualifications and competency to sit as a juror in this case." (R. 146.)

A rule to show cause was issued in response to this petition. (R. 6.) The rule was dated the same day that the petition was filed, and directed the defendant to—

> appear in person and show cause, before this Court, if any she has, on the 9th day of November, A. D. 1931, at 10 o'clock A. M., or as soon thereafter as the matter may be heard, why she should not be adjudged in contempt of the authority of this Court as prayed in said petition.

It also directed that a certified copy of the petition and of the rule be served upon the defendant on or before November 6, 1931. The rule was served on the day it was issued, November 4, 1931 [2] (R. 10), and, together with the Marshal's return showing that he had served the writ, was filed in the District Court on November 6, 1931 (R. 6).

In response to the rule to show cause the defendant on November 9, 1931, filed an answer (R. 6–10), which, among other things, denied that any answer or answers made by her upon her *voir dire* examination impeded or obstructed the due administration of justice in the selection of the jury, or otherwise, in the Foshay trial (R. 9).

The proceeding came on for hearing on November 9, 1931, before a court composed of two Dis-

[2] At the hearing on November 9, 1931, counsel for the petitioner stated that the "rule to show cause was served on my client last Wednesday." The rule was thus served on November 4, 1931, the date it issued.

trict Judges (District Judge Nordbye and District Judge, afterward Circuit Judge, Sanborn, neither of whom had presided at the Foshay trial). While counsel for the defendant was willing to proceed with the hearing if it involved merely the examination of the defendant, he objected to an immediate general trial of the issues in controversy on the ground that he had not had sufficient opportunity to prepare for such a trial, as the time which had elapsed since the return of the rule to show cause and his retention in the case had been devoted to the preparation of the defendant's answer. The court ruled, however, that the Government should proceed with the introduction of its evidence. It said that it did not think that a continuance at that time would avail the defendant much, but stated that if it should appear that the defendant needed further time when the Government had concluded its evidence, the matter of continuance would then be given consideration. To this ruling defendant noted an exception. (R. 12.)

The Government then presented its evidence. Many of the Government's witnesses were subjected to vigorous cross-examination by the defendant's counsel. (R. 13–58.) At the conclusion of the cross-examination of the Government's witnesses, petitioner's counsel did not ask that any of the Government's witnesses be later recalled for further cross-examination. The Government's testimony apparently consumed the morning of

November 9th, because after the Government had rested the defendant's counsel stated (R. 58):

> I repeat what I said this morning. I have not had adequate time to prepare this case, and I would like time to present the respondent's case.

In response to this request the court continued the matter until November 19th, a period of ten days. No objection was made on defendant's behalf to this action and no request for further time was then made. In passing upon the request for a continuance, the court said that it was—

> particularly interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary to the defense to properly present such additional facts that the Court should have. (R. 59.)

Pursuant to the court's order the matter again came on for hearing on November 19th. No request for a further continuance was made on behalf of defendant, and her counsel proceeded with the introduction of evidence for the defense. (R. 59–90.) The defendant took the stand in her own behalf and was given full opportunity to explain the charges against her. (R. 62–90.) After the defendant had rested the Government introduced the testimony of several witnesses in rebuttal. (R. 90–96.)

Certain motions were then interposed by the defendant and taken under advisement. Following this the arguments of counsel commenced. These arguments consumed the remainder of November 19th and a portion, at least, of November 20th. (R. 96–97.) On December 26, 1931, the court filed its findings of fact and conclusions of law. (R. 99–108.) It held that contempt had been established (R. 105–107) and, on the same day, sentenced the defendant to imprisonment in the county jail for a period of six months and to pay a fine of $1,000 (R. 98). It stayed execution of the sentence, however, for a period of 42 days to permit counsel for the defendant to be heard on the question of modification or suspension of sentence, in the event he so desired. Counsel for the defendant acquiesced in this arrangement. (R. 97–98.) The record does not show that any further evidence was introduced.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment convicting the defendant of contempt was affirmed, but the sentence was set aside and the case remanded for re-sentencing on the ground that Section 268 of the Judicial Code (*supra*, p. 3) made provision for fine *or* imprisonment only. (R. 121–145, 165.) One judge dissented. (R. 145–164.)

Although the petition upon which the rule to show cause issued referred to a number of questions and answers made by defendant on her *voir dire* examination, the findings of the trial court related

only to the defendant's answers to questions dealing with two subjects bearing upon her qualifications as a juror.

1. The District Court found that the defendant had obstructed the administration of justice when examined on her *voir dire,* by "deliberately and intentionally" concealing the fact that she had been employed during the summer of 1929 by the W. B. Foshay Company, a corporation with which the defendants in the criminal case had been connected. (R. 105–106.) The questions and answers on the *voir dire* examination of the defendant relating to this matter were as follows (R. 17):

> Q. Have you yourself ever been in any business of any kind?
>
> A. I have been a stenographer before my marriage; yes.
>
> Q. In what kind of business did you work?
>
> A. Well, I did some banking and some real estate and insurance, and I was with an automobile concern, with a Nash agency.

2. The District Court also found that the defendant had obstructed the administration of justice by stating falsely on her *voir dire* examination that she was free from bias and that her verdict would be based only upon the evidence as introduced and the law as given by the court. The pertinent questions and answers on her *voir dire* examination with reference to this subject were as follows (R. 18):

> Q. Well, do you feel that you are now—that your mind is now open and free, and

that you are not biased either one way or the other?

A. Yes; I do feel that way.

* * * * *

Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?

A. Yes; I do.

The District Court found that the following facts were established by the evidence and the admissions of the parties (R. 99–102):

The defendant was at all the times here material a resident of Minneapolis, Minnesota, and the wife of D. D. Clark. On August 24, 1931, she received a summons to report as a juror on September 1, 1931, at the Federal Building at Minneapolis. The jurors, who were summoned to report on that day, were all called in connection with the trial of *United States* v. *Foshay et al.* (R. 99.) At the time the defendant received her summons she desired to be excused from service during the week of September 1st. She did not then know for what case she was called. Shortly thereafter she telephoned her sister, a Mrs. Brown, at the Federal Building in St. Paul and made inquiry as to how she, the defendant, could be excused or her term of service as a juror postponed. Mrs. Brown went to see the Chief Deputy Clerk of the District Court at St. Paul and then called the defendant, advising her that if she wished to be excused she must see

the judge when she reported on September 1st. Mrs. Brown further informed the defendant that the trial for which she was summoned was the Foshay trial and that she would probably not be accepted since she had been employed by the Foshay Company, which was one of the companies with which the defendants in the criminal case had been connected. (R. 99.)

On the morning of September 1st the defendant, in company with her husband, reported at the court room in the Federal Building in Minneapolis where the case was to be tried. (R. 100.) The other members of the panel were assembled in that room. The District Judge examined the jurors as to their qualifications. While the jury was being drawn and before she was called for examination, the defendant made the statement to several other women on the panel that she wished to serve on the jury, that she had a special reason for wanting to be on the jury, and that she was afraid her former employment by the Foshay Company would disqualify her; that she had worked for the Foshay Company as a stenographer or typist for about two weeks in the summer of 1929, but did not know or come in contact with any of the defendants personally. (R. 100.)

The defendant's husband for a number of years prior to September 1, 1925, was president and in charge of the Citizens State Bank of St. Paul. Prior to the defendant's marriage to him in 1922

she had also worked in the bank as a clerk and stenographer and had had the title of assistant cashier. One of the defendants had been a depositor and borrower of the bank while the defendant was working there, and he was well acquainted with the defendant. (R. 100.) The defendant's husband knew Foshay and had done business with him and his company. (R. 100.)

Following the examination by the District Judge as to her qualifications,[3] the defendant was accepted as a juror. (R. 100–101.) She was the only woman upon the jury and the twelfth juror to be accepted. The jury was then sworn and placed in the custody of the United States Marshal, and throughout the trial, which lasted approximately eight weeks, was in the charge of two officers, one a man and the other a woman. During the first week of the trial the defendant made the remark to several of the jurors, on one occasion, that she regarded Mr. Foshay as a victim of circumstances; that he had gone to New York in the fall of 1929 to borrow $18,000,000, but that, because of the stock market crash, he had come back without a dollar. (R. 101.) When asked by one of the jurors where she procured that information, which was concededly not based upon any evidence in the case, she said it

[3] No further reference is made at this point to the finding of the District Court as to the questions asked by the District Judge and the answers given by the defendant on the *voir dire* examination, because the pertinent questions and answers have been set forth verbatim at p. 9–10, *supra*.

was from a newspaper which she had read before the trial and had forgotten about. (R. 101.) At a later period, she expressed to other jurors dissatisfaction with the Government because of the way the soldiers were treated after the war. (R. 101.)

During the deliberations of the jury, after the case was finally submitted, she announced that, since the prosecuting attorney had been unable to convince her of the guilt of the accused, the other jurors could hardly be expected to do so. She virtually closed her ears to the arguments of other jurors and with respect to the Government witness Cobel made a statement the effect of which was to charge him with having given perjured testimony in a case in the South in an attempt to convict an innocent man. (R. 101.) This statement was obviously based upon information given to her after the trial commenced by her husband, who was permitted to visit her about once a week during the trial and converse with her, supposedly in the hearing of the woman bailiff. (R. 101.) This information conveyed by him to his wife he had received from a Miss Todd, who was connected with his firm and who had expressed her opinion about Cobel upon seeing Cobel's picture in a newspaper during the Foshay trial. Miss Todd had recognized him from this picture as being the accountant who had testified in a fraud case in Kansas City in which she had at one time been interested. (R. 102.)

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The defendant, during the deliberations of the jury, expressed a wish that she might consult with her husband and secure his advice. (R. 102.) She also made statements to the effect that she could not vote to send seven men to the penitentiary. (R. 102.) The deliberations of the jury continued for approximately one week, and resulted in a disagreement, eleven voting for conviction and one (the defendant) for acquittal. (R. 102.)

SUMMARY OF ARGUMENT

I

The defendant was not denied due process when the court proceeded to trial on the return day of the rule to show cause. The rule sufficiently apprised her of the fact that the trial would proceed upon the return day. Examination of the record shows that she was not in any way prejudiced by trial on that date. A sufficient adjournment to enable her to prepare and make her defense was granted and her counsel conducted as full an examination of the Government's witnesses as he deemed advisable.

II

The defendant was not convicted of a crime with which she was not charged. The petition upon which the rule to show cause issued clearly advised the petitioner that she was charged with a contempt by reason of her conduct upon her *voir dire*

examination, which resulted in an obstruction of justice. Characterization of her conduct as perjury is immaterial, and the record shows that she was in no way misled as to the charge against her.

The contempt charged was a single contempt arising out of her conduct in answering various questions on her *voir dire* examination. Even if for any reason her conduct in answering questions dealing with her employment is disregarded, her false answers to the questions relating to her bias sustain her conviction for contempt. Since only one contempt was committed, there is no reason for an application of the rule applied where separate acts of contempt are charged and conviction of one act is set aside. In the present case there is no reason to suppose that the sentence of the District Court was based in part upon each false or misleading answer made by the defendant.

III, IV

The defendant's concealment of her previous employment with the Foshay Company and her conduct upon her examination on the *voir dire* constituted contempt, although it did not immediately interfere with the order and decorum of the courtroom. Physical affront to the court is not a necessary element of criminal contempt. Defendant's conduct clearly obstructed the court in the performance of its judicial functions, since it made the trial of the defendants in the case upon which

this defendant sat as a juror, a futility. Under the authorities, defendant's conduct clearly constituted contempt.

V

Since the evidentiary facts found by the District Court had a reasonable tendency to sustain the general conclusions of fact made by that court, they should not be disturbed. The findings are supported by substantial evidence, and, in many instances, constitute verbatim statements of the testimony. An examination of the record shows that the conviction of the defendant was clearly justified.

VI

As the gist of the offense with which the defendant was charged was deliberate obstruction of the administration of justice and not perjury, the rule as to the quality of proof in perjury cases is inapplicable.

VII

The testimony of defendant's fellow jurors concerning her actions and utterances in the jury room, introduced for the purpose of showing the wilful purpose of the defendant in testifying on her *voir dire* examination that she was free from bias or prejudice, was competent. This evidence was not introduced for the purpose of impeaching a verdict or showing misconduct in the jury room, and the rules applicable to testimony used for such pur-

poses are not applicable to the testimony here. In any event there is not merit in the point, since the court below correctly held that there was sufficient other evidence to sustain defendant's conviction.

VIII

The contention that the defendant's denials by answer and testimony amounted to compurgation of the contempt is not properly before this Court. Even if it is, the rule, which is of medieval origin, has no proper place in the Federal judicial system, and there is no remnant of the ancient rule which should be regarded as surviving the previous decisions of this Court.

ARGUMENT

I

THE TRIAL COURT DID NOT DENY THE DEFENDANT DUE PROCESS BY PROCEEDING TO TRIAL ON THE RETURN DAY OF THE RULE TO SHOW CAUSE

It was said in both the majority and dissenting opinions below (R. 125, 148) that the criminal contempt here involved, although committed within the presence of the trial court, was one which, because of its character, could not have been known to the court as the result of its judicial knowledge or observation, and that it was thus a "constructive" rather than a "direct" contempt. In a proceeding to punish such a contempt, due process requires, according to the decision of this Court in *Cooke* v. *United States,* 267 U. S. 517, 537, "that the accused should be advised of the charges and

have a reasonable opportunity to meet them by way of defense or explanation." This includes, as this Court said in the *Cooke case*—

> the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

In the instant case defendant contends that by proceeding to trial on the return day of the rule to show cause the trial court did not give her a reasonable opportunity to make her defense, and thereby deprived her of due process, because the rule did not apprise her that a trial would be had on the return day and that a large number of witnesses summoned on behalf of the Government would then be examined, and because an insufficient time elapsed between the service of the rule and the return day to permit her to prepare for trial. (Br.[4] p. 14.)

The rule to show cause was dated November 4, 1931 (R. 6) and was served the same day (R. 10).[5] That it fairly apprised the defendant that she would be required to stand trial upon the return day is,

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[4] The brief in support of the petition for certiorari will hereafter be designated as "Br." The supplemental brief filed after certiorari was granted will be designated as "S. Br."

[5] See footnote 2, p. 5, *supra*. It appears that on November 3d the defendant was interrogated privately about her conduct on the jury (R. 18, 68–71, 74) so that even before the rule to show cause was served she knew that her conduct was being scrutinized.

we think, evident. With the rule there was served, as directed by the rule, a copy of the petition stating the charges. After reciting the filing of the Government's petition the rule specifically directed the defendant to—

> appear *in person* and show cause, * * * if any she has, on the 9th day of November, A. D. 1931, at 10 o'clock A. M., * * * why she should not be adjudged in contempt of the authority of this Court as prayed in said petition. (R. 6.) (Italics ours.)

That she should show cause *in person* is inconsistent with the idea that she was being called upon simply to submit her response to the petition on the return day. In fact, under the terms of the rule, she could have stated her defense orally. The exact form of the procedure followed is not important. So long as oppression or unfairness does not result, the matter is one for judicial regulation. *Cooke* v. *United States, supra; In re Savin, Petitioner,* 131 U. S. 267. It also seems clear that the procedure adopted did not contemplate merely a formal arraignment of the defendant on the return day, as in a criminal case. One of the purposes of such arraignment is the formal advisement of the defendant of the charges against him. That had already been done in the instant case. If then, as we submit, the rule to show cause was a summons to trial it necessarily constituted notice to defendant to be prepared to meet the evidence for the Government.

The question which then arises is whether the defendant was embarrassed or prejudiced in making her defense because she was required to proceed to trial on the return day of the rule to show cause.

The record discloses that the rule to show cause came on for hearing before a court of two judges, neither of whom had sat in the trial of the criminal case out of which the contempt proceeding grew. Counsel for the defendant filed an answer to the petition which showed that he fully comprehended the charges made and the issues presented (R. 6–10), but objected to an immediate hearing if it should involve anything more than an examination of the defendant personally. Although both the petition and the answer are short, covering together only ten pages of the printed record, counsel stated that the time which had elapsed between the service of the rule to show cause and the return day had been too short to allow him to do more than frame his answer and that he had had no opportunity to prepare for an extended trial. (R. 10–12.) He accordingly requested that the case be continued for a period of at least thirty days to permit adequate preparation. (R. 12.)

The court denied this request but said that if it should appear, after the Government had introduced its evidence that the defendant—

> should have further opportunity to meet any evidence presented by the Government in support of this petition, we would be very

> glad to hear you further on it, and pass upon that question at that time. (R. 12.)

As the court stated that " It does not seem to us that a continuance now is one that would avail the defendant very much, whether it is thirty days or a week " (R. 12), it obviously concluded that the Government's evidence could be taken without prejudicing the defendant's right to a fair trial of the issues. The defendant noted an exception to the court's ruling (R. 12), and the Government introduced its evidence. That the defendant was not prejudiced by the denial of a continuance at the commencement of the trial is evident from the fact that a number of the witnesses called by the Government were subjected to vigorous cross-examination. (R. 13, 20, 29, 32, 38, 43, 45.)

After the Government had rested, counsel for the defendant repeated his request for a continuance (R. 58), and the court ordered that the case stand adjourned until November 19th, a period of ten days. It stated in this connection that—

> we have assured Mr. Ueland [counsel for the defendant] that the Court is principally interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary for the defense to properly present such additional facts that the Court should have. (R. 59.)

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The time allotted was evidently satisfactory to counsel for the defendant because no exception was taken to the court's ruling and no further continuance was requested when the court reconvened on November 19th. Despite the offer of the court of its process to assist the defendant in bringing before it any witnesses that the defendant might deem necessary to aid in her defense, no request was made by counsel for the defendant, at any time, for the recall of any of the Government's witnesses for further cross-examination and on the adjourned date he proceeded immediately with the introduction of testimony for the defense. Thus after ample opportunity for study and investigation, counsel for the defendant must have concluded that the cross-examination of the Government's witnesses had been entirely adequate and that no further cross-examination was advisable.

The record further discloses that after the introduction of evidence had been concluded the defendant's counsel was given full opportunity to argue the questions of law involved, and after conviction the case was held open for a period of 42 days, under arrangements evidently satisfactory to defendant's counsel, to permit the presentation of any extenuating circumstances which might warrant the modification or suspension of sentence. (R. 96–98.)

That the defendant was given full opportunity to make her defense and that she was not embarrassed because of any lack of opportunity for prep-

aration is evident from the record. The fact that she had but five days' notice of the charges is obviously but one of numerous elements to be considered in determining whether she was accorded due process. In *In re Savin, Petitioner,* 131 U. S. 267, *supra,* only one day ensued between the notice of the charges and the hearing.

Petitioner questions the fairness of putting her to trial immediately following the filing of her answer. She says that in a criminal case triable by jury it is fundamental that the accused may not be put to trial, over his objection, immediately after a plea of guilty. (S. Br. pp. 5–6.) If no notice had been given to the defendant in the instant case that she was to be placed on trial on the return day, there would possibly be merit in her contention even though the procedure in contempt cases is essentially informal. But, as heretofore stated, the rule to show cause clearly advised her to be ready for trial on the return day. In a criminal case the first formal notice which the defendant has of the charges against him is when he is arraigned. This accounts, of course, for the rule in such a case that the defendant should have a reasonable time after arraignment to prepare for his defense. Whether due process has been denied depends, of course, upon the peculiar facts of each case. General principles must be construed in the light of particular circumstances. We believe that the court below properly concluded that the record here does not disclose a denial of due pro-

cess in connection with the present claim of defendant. The dissenting judge below does not discuss the question and thus he apparently concurred in the conclusion of the majority upon it.

The defendant cites *Powell* v. *Alabama,* decided by this Court on November 7, 1932 (Nos. 98–100, present term), but that case involved the question whether the defendants were, in substance, denied the right to counsel. No such question is here presented.

II

THE DEFENDANT WAS NOT CONVICTED OF A CONTEMPT WITH WHICH SHE WAS NOT CHARGED AND HER CONDUCT CONSTITUTED ONE CONTEMPT

The defendant also contends that she was denied due process because, being charged with perjury as contempt, she was convicted of withholding information when examined on her *voir dire.* She asserts that she was charged with two separate contempts: (1) failure to disclose her employment by the Foshay Company and (2) perjury in stating that she felt unbiased and thought she could base her verdict on the evidence and the law as given to her by the trial court. (Br. 16.) The argument that there was a denial of due process seems to be addressed to what she denominates as the first contempt. It is argued that if she could not lawfully be convicted for the first contempt the decisions of this Court in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, and *Toledo Newspaper Co.* v. *United States,* 247 U. S.

402, required the court below to reverse the conviction. We believe that there was no denial of due process as urged and that petitioner was charged with a single contempt resulting in the obstruction of justice which arose by reason of her several answers to question propounded to her by the trial court upon her *voir dire* examination.

The trial court clearly regarded the charge against the petitioner as stating the commission of a single contempt of court (R. 102) and this was the view taken by the court below (R. 144–145). The petition upon which the rule to show cause was based referred to a number of false statements alleged to have been made by the petitioner upon the single occasion, when she was examined on the *voir dire* by the trial judge at the Foshay trial. (R. 3–5.) After detailing the questions and answers of the petitioner and specifying the respects in which the answers were false, the petition concluded (R. 5):

> And the said Genevieve A. Clark, in the manner and form aforesaid, having taken an oath before a competent tribunal in a case wherein the law of the United States authorized an oath to be administered that she would truly depose and testify, wilfully and contrary to her said oath, did depose and state material matters which she did not then believe to be true and did then and there commit wilful and corrupt perjury; *and the due administration of justice, in the selection of a jury, and in the trial of said Foshay*

> *case in this Honorable Court was in fact thereby corruptly and unlawfully impeded and obstructed.* (Italics ours.)

The basis for the petitioner's contention that she was convicted of a contempt with which she was not charged seems to be the statement in the petition just quoted that by her answers she committed "wilful and corrupt perjury." Petitioner interprets the petition, therefore, as charging her with contempt based entirely upon the fact that her answers were perjurious. The trial court convicted the petitioner because her answers upon her examination on the *voir dire* were so false or deceptive as to obstruct the court in the performance of its duty and considered that it was immaterial whether her conduct amounted to perjury or not. (R. 102.) Finding that the petitioner "deliberately and intentionally concealed her association with the Foshay Company when she was examined by the Court" (R. 105) and "that her mind was not free and open when she was accepted as a juror, and her answers to the Court in regard thereto were false and untrue" (R. 107), the trial court concluded that she was guilty of contempt because her false answers obstructed the court in the performance of its duty (R. 107). In sustaining her conviction the court below, after a review of the evidence, concluded that the findings of the trial court were supported by substantial and sufficient evidence. (R. 136.) For reasons stated at *infra,* page 41, such findings should be regarded as conclusive.

We believe that the petitioner's contention that she was convicted of a contempt with which she was not charged is based upon a misconception of the charge laid in the petition upon which the rule to show cause was based. Both courts below treated the petition as charging a contempt consisting of an obstruction of justice. We believe that this is the proper interpretation of the charge made against the petitioner. The distinction between such a charge and a charge of perjury was succinctly stated by the court below (R. 128):

> The gist of criminal contempt is the obstruction of the administration of justice. The gist of perjury is falsification under oath.

While perjury may amount to contempt if the obstructive element is present (*Ex parte Hudgings*, 249 U. S. 378), the fundamental inquiry is not whether there has been perjury, but whether the tendency of the defendant's conduct is to obstruct the performance by the court of its judicial functions. If the defendant's conduct has that tendency, it may constitute a criminal contempt even though all of the elements of perjury are not present. See *People ex rel. Nunns* v. *County Court*, 188 App. Div. (N. Y.) 424, 442; *Young* v. *State*, 198 Ind. 629, 632, and cases cited, *infra*, pp. 35–38. The fact that the charge describes the conduct as perjury does not alter its essential nature, and this characterization ought to be disregarded if the defendant was sufficiently warned

that the charge which she would have to face was not perjury but the contemptuous obstruction of justice.

We believe that an examination of the petition for the rule to show cause, in the light of these principles, shows that it sufficiently informed the defendant that she was charged with a criminal contempt resulting in the obstruction of justice because of her false answers upon the *voir dire* examination, among which were her concealment of her employment by the Foshay Company and her false answers to the questions designed to establish whether she was biased. The petition specifically pointed out the materiality of determining whether the petitioner had ever been employed in any business, and if so, when. (R. 2.) It then proceeded, somewhat inartistically, but, we believe, adequately, to identify the specific portions of the petitioner's *voir dire* examination involved in the charge of criminal contempt.

That the defendant knew that she was being called to account for failing to disclose her employment by the Foshay Company is evident from her answer, in which she points out the specific questions and answers relating to the matter of employment and endeavors to justify her failure to disclose her employment by the Foshay Company. (R. 8–9.) Likewise, much of her testimony upon direct examination was directed to the same end. (R. 65–67.) Similarly, her answer

shows that she was aware that one of the questions with respect to which she would be examined involved her answers upon questions as to her bias (R. 9) and her direct testimony at the hearing shows that she was cognizant of the fact that this was a material portion of the charge of criminal contempt. (R. 67.) Furthermore she denied that any answer or answers made by her impeded or obstructed the due administration of justice in the selection of the jury, or otherwise, in the trial of the Foshay case. (R. 9.) Thus the defendant was aware of the gravamen of the offense charged and met it squarely in her denials. It does not appear that the defendant asked for a bill of particulars, and we believe that there is no basis in the record for her contention that the insertion in the petition of the characterization of her answers as perjury (R. 5) in any way misled her or induced her to limit her defense to an attempt to meet a charge of perjury alone.

The question whether petitioner was convicted of a contempt with which she was not charged was carefully considered by the court below. That court concluded, correctly we believe, that the petitioner was sufficiently advised of the charges against her. (R. 125–129.) The dissenting judge in the court below took a different view. (R. 148–152.) It is well settled that a proceeding to punish contempt is not in all of its characteristics a criminal prosecution, and the technical rules of plead-

ing in an indictment do not obtain. Due process is not denied if the defendant is fairly apprised of the nature of the contempt with which he is charged. In determining this, it has been held that the entire record may be examined. See *Blackmer* v. *United States,* 284 U. S. 421, 440; 49 F. (2d) 523, 529 (App. D. C.); *Sinclair* v. *United States,* 279 U. S. 749; *Cooke* v. *United States,* 267 U. S. 51, 537 *supra; Ex parte Grossman,* 267 U. S. 87, 117; *Myers* v. *United States,* 264 U. S. 95, 103; *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, *supra; McGovern* v. *United States* (C. C. A. 2d), decided August 30, 1932, not yet reported, certiorari denied October 24, 1932, No. 392; *Conley* v. *United States,* 59 F. (2d) 929 (C. C. A. 8th); *Kubik* v. *United States,* 57 F. (2d) 477 (C. C. A. 8th); *Lang* v. *United States,* 55 F. (2d) 922 (C. C. A. 2d), certiorari dismissed as improvidently granted, 286 U. S. 523; *Armstrong* v. *United States,* 18 F. (2d) 371, 372 (C. C. A. 7th), certiorari denied, 275 U. S. 534; *Schwartz* v. *United States,* 217 Fed. 866 (C. C. A. 4th). Accordingly, we believe that there is no basis for the petitioner's contention that she was convicted of a contempt with which she was not charged.

We understand that petitioner directs her argument upon this question entirely to the charge in the petition dealing with questions and answers relating to her previous employment. Even if it be assumed (contrary to our view of the fact) that the petition did not sufficiently charge that in answer

to those questions she had wilfully and falsely concealed the fact that she had been employed by the Foshay Company, there would be no reason to disturb the judgment of the court below. The trial court found that the petitioner's answers to the questions relating to her bias were false and that such false answers obstructed the court in the performance of its duty and constituted contempt. (R. 107.) This finding was considered by the court below, which held that it was supported by substantial and sufficient evidence. Thus the conviction of contempt arising out of the petitioner's conduct upon her examination on the *voir dire* is supported a finding that her false answers to some of the questions in that examination obstructed justice.

The petitioner contends, in effect, that the charge against her alleged several separate acts of contempt and that upon the authority of *Gompers* v. *Buck's Stove & Range Co., supra,* and *Toledo Newspaper Co.* v. *United States, supra,* if the petitioner was not guilty of one of the contempts charged, the judgment of conviction must be reversed. But this contention proceeds from a misunderstanding of the nature of the charge. The petitioner was not charged with separate acts of contempt on different occasions so that it should be assumed that her punishment for contempt rested upon a determination that she was guilty of all the acts and that the trial court would have meted out a different punishment if she was not guilty of all the acts.

The criminal contempt in this case arose out of petitioner's conduct upon her *voir dire* examination. It is apparent from the petition upon which the rule to show cause was based that it did not charge separate acts of contempt. Petitioner's conduct which was alleged to constitute contempt occurred on a single occasion and clearly constituted but a single contempt. We believe, therefore, that the rule in the *Gompers case,* restated in the *Toledo Newspaper Co. case,* is inapplicable. In the *Gompers case* several defendants were charged with contempt in having made and published various speeches, editorials and publications at different times in violation of an injunction, 221 U. S. 423. The trial court made special findings as to several of the charges, found all of the defendants guilty as to some of the charges, some of the defendants guilty as to others, and the several defendants individually guilty as to others. Thus in that case the defendants were clearly charged with separate contempts. The sentence did not indicate how much of the punishment was imposed for disobedience in any particular instance. In these circumstances, this Court said (p. 440) that it could not—

> suppose that having found them guilty of these nine specific acts he [the trial judge] did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be re-

> versed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

In the *Toledo Newspaper Co. case* there were similar charges of separate contempts which were stated in separate counts dealing with publications made at different times. We submit that the rule laid down in the *Gompers* and *Toledo Newspaper Co. cases*, requiring reversal where a defendant has been convicted of several separate acts of contempt and a general sentence has been given, if the defendant is not guilty of one of the separate acts of contempt, has no application here. Even if the finding that the petitioner was guilty of concealing her employment with the Foshay Company should be disregarded for the reasons suggested by petitioner, we believe it to be clear that the contempt arising out of her false answers to other questions on the same occasion and the sentence therefor are unaffected.

The obstruction of justice which constituted the contempt was due to the fact that through petitioner's conduct her potential unsuitability as a member of the jury was concealed from the court. If she was biased and thus unable to decide the case upon the evidence and the law as stated by the trial court, she was unfit for service on the jury. Her previous employment by Foshay & Company did not add to her unfitness. It may have furnished

a reason for her bias and if disclosed would have laid a basis for further questioning and, perhaps, for challenge. While concealment of that fact alone might have constituted contempt, the obstruction of justice remains the same if it be left out of account. When petitioner, by false answer that she was free of bias, induced the court to accept her as a juror, her presence on the jury insuring that there never could be a verdict of guilty, no matter what the evidence of defendants' guilt, there was a complete obstruction of justice. All further proceedings in the case were rendered nugatory.

We submit that there is no basis for an assumption that the trial court, in passing sentence, imposed some unidentified part for each false answer in the course of a single examination. The affront to the administration of justice, the defeat of the purpose of having any trial of the defendants in the Foshay case, was complete when the petitioner concealed the fact that she could not render a verdict according to the law and the evidence in that case. Thus, while we believe that the trial court properly found that petitioner had wilfully concealed her previous employment with Foshay & Co., and in doing so obstructed justice, and also that she had testified falsely as to her freedom from bias, the judgment of conviction should not be reversed merely if, for any reason, the finding as to her concealment of previous employment is disregarded.

III, IV

DEFENDANT'S CONDUCT CONSTITUTED CONTEMPT

Defendant contends that her concealment of her previous employment with the Foshay Company and her other conduct could not be considered a contempt of court in the absence of acts that "interfere with the order and decorum in the court room." (Br. p. 21.) It is settled, however, that acts tending to obstruct the performance by the court of its judicial duty, whether or not they involve any physical affront to the court or immediate disruption of its proceedings, may constitute contempt. Although contempt is perhaps usually some positive interference with the court, the power to punish for contempt has been extended both in this country and in England to new types of cases as they arise, the inquiry in each instance being merely whether there has been a tendency to interfere with the administration of justice. See *Ex Parte Hudgings,* 249 U. S. 378, 383; *Sinclair* v. *United States,* 279 U. S. 749, *supra;* Oswald, *Contempt of Court,* pp. 5, 6; *Helmore* v. *Smith,* 35 Ch. Div. 449; *In re Johnson,* 20 Q. B. D. 68, 74; 1 Bailey, *Habeas Corpus,* Sec. 63.

This Court has held that abuse of a court by deception is obstructive of the administration of justice and is a punishable contempt. Thus, in cases where the parties by collusion or concealment have presented a case for the opinion of a court, there being no actual controversy, this Court has said that "the whole proceeding was in contempt of

court." *Lord* v. *Veazie*, 8 How. 250, 255; *Cleveland* v. *Chamberlain*, 1 Black 419, 426.

The same view has been expressed in many cases in the Federal courts where witnesses have concealed material facts or have falsified their testimony. In these cases it has been deemed unnecessary to demonstrate actual perjury. The basis of the charge is that the court has been imposed upon and hampered in the conduct of its affairs. In *United States* v. *Dachis*, 36 F. (2d) 601 (S. D. N. Y.), a witness before the grand jury falsely stated that he was unable to produce certain papers in compliance with a *subpœna duces tecum*. His conduct was held to be a contempt of the court with which the grand jury was connected.

In *United States* v. *Karns*, 27 F. (2d) 453, 33 F. (2d) 489 (C. C. A. 8th), certiorari denied, 280 U. S. 592, one of the defendants offered in evidence a false instrument of lease. This action was held contemptuous, not because it constituted perjury or because of any interference with order in the court room, but because its inherent effect was to impede the administration of justice. In *Bowles* v. *United States*, 44 F. (2d) 115, 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648, Bowles was held quilty of contempt. The facts were that though he has been disbarred as an attorney he represented himself to the court as a practicing attorney in good standing in another jurisdiction and thus obtained permission to represent a prisoner at the bar. His misrepresentation

was not immediately apparent nor in any way was it productive of disorderly consequences, but it was clearly an imposition upon the court and an interference with its judicial functions. In *Ex parte Steiner*, 202 Fed. 419 (C. C. A. 2d), it was held that the District Court had the power to punish as contempt a conspiracy to mislead the court by swearing to false affidavits in opposition to a motion for preliminary injunction; the attempted deception of the court was regarded as misbehavior obstructing justice.

Administration of the bankruptcy laws has been productive of numerous examples of contemptuous conduct on the part of witnesses disinclined to testify candidly. In *In re Michaels*, 194 Fed. 552 (E. D. N. Y.), a witness who was not the bankrupt was held guilty of contempt for giving false testimony. Investigation showed no ground for prosecution for perjury. But the witness' "conduct was contemptuous, in that he avoided telling the whole truth, that he professed ignorance as to matters as to which he must have had knowledge, and that he showed disregard for and brought disrespect upon the court proceedings by not playing the part of an honest man and a truthful witness."

Similarly, mere submission to examination has been held not to be a sufficient regard for the demands of an orderly administration of justice, where the witness has displayed a disposition to evade frank answers and to withhold the truth. See

Haimsohn v. *United States*, 2 F. (2d) 441 (C. C. A. 6th); *In re Bronstein*, 182 Fed. 349 (S. D. N. Y.); *In re Fellerman*, 149 Fed. 244 (S. D. N. Y.); *In re Gitkin*, 164 Fed. 71 (E. D. Pa.); *In re Schulman*, 177 Fed. 191 (C. C. A. 2d). See also *Loubriel* v. *United States*, 9 F. (2d) 807 (C. C. A. 2d); *O'Connell* v. *United States*, 40 F. (2d) 201, 204 (C. C. A. 2d), certiorari granted, 281 U. S. 716, dismissed pursuant to stipulation; *Lang* v. *United States*, 55 F. (2d) 922 (C. C. A. 2d), certiorari dismissed as improvidently granted, 286 U. S. 523, *supra*.

Similar results are reached by a number of State courts in circumstances that disclose interference with the administration of justice by falsification of facts or by failure to disclose information which should have been presented. In *Gibson* v. *Tilton*, 1 Bland 352 (Md.), the court said that a party who used in a proceeding within its jurisdiction a false affidavit made by another person outside the State but which he knew to be false, was punishable for practicing an imposition on the court. In *Welch* v. *Barber*, 52 Conn. 147, 155–156, and *State* v. *Moody*, 47 S. D. 111, the defendants had procured postponement or continuance of trial on the basis of misleading representations to the court. In both instances the conduct was held contemptuous because in obstruction of justice. In *Nunns* v. *County Court*, 188 App. Div. 424, Nunns had been drawn as a petit juror. He was asked if he knew the defendants or their reputation and answered that he

did not, whereupon he was accepted to serve as a juror on the trial. After the case was submitted he informed his fellow jurors that he knew the defendants. He was held guilty of contempt.

Under these authorities we believe it to be clear that a prospective juror who wilfully and knowingly conceals information which may have a material bearing upon his eligibility for jury service, is guilty of contempt. Both courts below have concluded that the concealment of the defendant's employment was wilful and obstructed the performance of the judicial functions of the trial court. The defendant contends that such a rule imposes a duty to speak upon jurors which is not imposed upon witnesses and therefore that concealment of material information by jurors can not amount to contempt. But we believe there is little or no analogy. It is assumed that the truth will be elicited from witnesses through the orderly process of examination by opposing counsel and we believe that the fact that witnesses may not volunteer unresponsive information furnishes no standard for the duty of a prospective juror. In a *voir dire* examination conducted by the court, the facilities of counsel who have studied and prepared the case are not involved.

The selection of a qualified jury by the trial judge is not a game of wits in which jurors may stand upon strictly responsive answers where they know that information in their possession may

have a material bearing on their fitness, and the questions asked or other circumstances call for frank disclosure when the witness is aware, as petitioner was, of disqualifying bias. Cf. *Pearcy* v. *Michigan Mutual Life Ins. Co.*, 111 Ind. 59. Deliberate concealment of bias by a prospective juror is necessarily contumacious, obstructive, and contemptuous. The rule for which we contend imposes no serious burdens upon jurors which their place in the process of administering justice does not demand. If a prospective juror fails to volunteer information through fault of memory or innocent ignorance, it may be assumed that his conduct would not ordinarily be contemptuous. Such a situation is not involved here, where both courts, after a review of the evidence, have concluded that the concealment was wilful and that the defendant knew of the material bearing of the information which she withheld.

Similarly, we believe that under the authorities cited the defendant's false answers to questions designed to disclose whether she was free of bias constituted a contempt, however respectfully the false answers may have been given. The defendant's conduct caused an extended trial to go for naught. The fact that her manner was not openly insulting is immaterial. Her conduct evidenced gross lack of respect for the serious purpose of the court and a determination to impose upon it in such a way that from the moment the defendant was accepted

for the jury there was a complete obstruction of the court in the performance of its proper functions. Within the settled principle that a tribunal must be able to protect itself from wilful obstructions of justice, defendant was guilty of contempt of court.

V

THE FINDINGS MADE BY THE DISTRICT COURT SHOULD NOT BE DISTURBED

The next contention urged by the defendant is that the finding of the District Court that the defendant answered falsely the questions ~~representing~~ respecting her freedom from bias and that these false answers obstructed the administration of justice can not be sustained because it was not established by the evidence beyond a reasonable doubt. The District Court recognized and correctly applied the rule that the burden was upon the Government to prove the defendant's guilt beyond a reasonable doubt. (R. 103.) But in an appellate court it is settled that the findings of fact made by the trial court in a contempt case are conclusive. It is not within its province to weigh the evidence. *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324, 338, *supra*; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 420, *supra*. See also *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 441, *supra*. The only inquiry permitted, it was said in the *Toledo Newspaper Co. case*, is "whether the evidentiary facts found had any reasonable tendency to sustain the general conclusions of fact" which are based upon them.

The evidentiary facts contained in the finding of the District Court are set forth at R. 99–102. (See also pp. 10–14, *supra.*) That these findings support the court's ultimate conclusion of fact that the defendant answered falsely that she was free from bias and that such answers obstructed the court in the performance of its duty, seems apparent. As the trial court said (R. 106):

> Her [the defendant's] studied attempt * * * to get on the jury, her evasive and incomplete answers, coupled with her conduct after she was accepted, convince us that her mind was prejudiced by some person, or for some reason, before she took her oath as a juror.

It is evident, therefore, that in reaching its conclusion the court did not rely solely upon what transpired after the defendant had been accepted as a juror but considered as well the evidence bearing upon her failure to disclose her employment by the Foshay Company.

All of these findings are supported by substantial evidence. In fact, many of them are almost verbatim copies of the testimony upon which they are based. The testimony bearing upon her employment with the Foshay Company is quoted at length in the opinion of the court below (R. 129–131), and it would seem unnecessary to repeat it here. While similar quotations from the testimony do not appear in that opinion with reference to her statements and actions before and after the jury

retired, the findings of the District Court with respect thereto (R. 101–102; see also pp. 12–14, *supra*) are so nearly like the testimony of the witnesses that a repetition of the testimony would practically amount to a duplication of those findings. It is evident from the findings and testimony that the District Court gave little credence to the denials and attempted explanations by the defendant of the facts disclosed by the very damaging testimony against her, but that court had the witnesses before it and was obviously in a better position to judge as to the demeanor and apparent sincerity of the witnesses than anyone not so situated.

VI

THE RULE AS TO THE QUALITY OF PROOF IN PERJURY CASES IS NOT APPLICABLE

Petitioner contends that her conviction cannot be sustained because, although she was charged with perjury, the Government relied wholly upon circumstantial evidence, despite the rule in perjury cases that the crime must be proved by the sworn and direct testimony of two living witnesses, or of one witness and by corroborating circumstances. (Br. pp. 28–30; S. Br. 8–10.) Apparently this contention relates only to the defendant's answers to questions relating to her bias. It does not appear to have been presented to the trial court by proper motion or otherwise. It was not specifically dealt with in the assignments of error in the court below nor was it expressly passed on by that

court. Accordingly, we submit that the question should not now be considered.

The contention is without merit, for as we have heretofore pointed out (*supra*, pp. 25–29), the gist of the offense with which the defendant was charged was not perjury but criminal contempt based on the deliberate obstruction of the administration of justice. Whether the false swearing amounted to perjury or not was immaterial. While the Government was required to prove the offense beyond a reasonable doubt (*Gompers* v. *Buck's Stove & Range Co., supra*), it clearly was not held to any particular type of proof. The traditional limitation upon the mode of proof of perjury seems to have no proper place in such a proceeding. Vindication of the dignity of the court and its protection against the wilful obstruction of its process is not hedged about with formal rules which have no logical relation to that purpose.

VII

THE TESTIMONY OF DEFENDANT'S FELLOW JURORS CONCERNING HER ACTIONS AND UTTERANCES IN THE JURY ROOM AFTER THE CASE HAD BEEN SUBMITTED TO THE JURY WAS PROPERLY RECEIVED IN EVIDENCE

It is contended by the defendant that the trial court erred in receiving in evidence the testimony of the defendant's fellow jurors concerning her actions and utterances in the jury room after the case had been submitted to the jury. (Br. pp. 31–36.) This testimony was introduced for the pur-

pose of showing the wilful purpose of the defendant in testifying on her *voir dire* examination that she was free from bias or prejudice, in order to be accepted as a juror, biased against the prosecution.

So far as we can ascertain, there is only one case directly in point upon this question, and this decision is in favor of the admissibility of the testimony. In *People ex rel. Nunns* v. *County Court,* 188 App. Div. (N. Y.) 424, it appears that the relator was drawn as a petit juror in the trial of an indictment for keeping a disorderly house. The prosecuting attorney, in examining the jury panel, informed them that the prosecution sought an indifferent jury of whom none was acquainted with the defendants or their establishment. None of them answered that they had knowledge of defendants or their place of business. Thereupon, in response to specific questions put to him, the relator answered that he did not know the defendants or either of them, and that he knew nothing of their place. Thereafter the relator was sworn, sat throughout the trial and took part in the verdict, by which the defendants were acquitted. After the case had been submitted to the jury and they had been sent to the jury room, the relator there stated to his fellows, or some of them, that he knew the defendants and their place, that he had visited it several times, and that in his opinion it was all right and a correct place. The trial court found that the answers which the juror had made

to the prosecuting attorney were false, that the conduct of the relator in the court room and in the jury room was deliberate, and that his behavior constituted criminal contempt of court. On appeal, one of the questions raised was whether the relator's fellow jurors were competent to testify to his statements in the jury room. In a thoroughly considered and well reasoned opinion the appellate court held (two judges dissenting) that the testimony of the defendant's fellow jurors was properly received (see particularly pp. 427–428, 430–431, 433, 434–435).

This decision finds support in a dictum of this Court in *McDonald* v. *Pless*, 238 U. S. 264, 269. There the question involved was whether a juror was competent to testify that he and his colleagues had been guilty of misconduct in reaching their verdict. This Court, after reviewing the authorities, stated that while the general rule was that a losing party can not, in order to secure a new trial, use the testimony of jurors to impeach their verdict, "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" It ruled, however, that the case before it was not of that character. It then proceeded to say that (p. 269):

> The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is with-

out foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

In the instant case the testimony is not being used to impeach a verdict but is being used in a contempt proceeding to punish a wrongdoer. We therefore submit that the testimony was clearly admissible.

The decisions cited by the defendant are clearly not in point. She relies principally upon *Matter of Cochran,* 237 N. Y. 336, which she asserts has repudiated the decision in the *Nunns case.* We do not think it has any such effect. The facts in that case were as follows: One Plant was on trial for criminally receiving stolen property. Cochran was called as a juror, examined, and accepted by the District Attorney, heard the evidence, and thereafter, having been sent to the jury room, deliberated with his fellow jurors as to the verdict. The result was a disagreement and the jury was discharged. Contempt proceedings followed.

The charges against Cochran were of two classes: (1) Alleged untrue statements made by him on his examination as to his qualifications as a juror, in that he falsely stated that he had no bias or prejudice that would affect his decision and that he knew of no reason why he could not fairly try the case; (2) improper conduct in the jury room during the deliberations of the jury, intended to affect the result—in that he stated facts to be in

evidence as to which no testimony had been given; that he made a proposition to the jurors that they should acquit if one Smith, a stranger to the proceeding, would give a bond for Plant's future good behavior, and that he failed to keep his promise to render a decision on the evidence, to be a fair and impartial juror and to obey the instructions of the court, because believing the defendant to be guilty he still refused to vote for his conviction. As to the charges of the first character, which were the only ones similar to those involved in the instant case, the court said (p. 338):

> we do not decide that if he falsely answered the questions of the district attorney whether under oath or not under oath he would be guilty of criminal contempt of court. (*People ex rel. Nunns* v. *County Court, Nassau Co.*, 188 App. Div. 424.) *We fail to find, however, any evidence whatever from which an inference can be drawn that his answers in this respect were untrue at the time they were made.* * * * (Italics ours.)

It then held that the second class of offenses charged did not afford a basis for a conviction of criminal contempt on the ground that (pp. 340–341)—

> no juror may be punished for contempt for his part in any proceedings connected with the rendition of the verdict, because of discussions had, arguments used, statements made, for the reasons given by him for his vote or for the vote itself.

In the instant case no attempt is being made to punish the juror for anything said or done in connection with the rendition of the verdict. The testimony in question was used merely to show the juror's state of mind and motives when examined upon the *voir dire*. The court in *Matter of Cochran*, 237 N. Y. 336, *supra*, appears to recognize that in certain cases the juror's testimony is not inadmissible, for it says (p. 340):

> Nor probably may any juror called as a witness, in a proper proceeding assert that he is privileged from giving testimony as to occurrences in the jury room. * * *

The defendant also relies upon certain general statements in *Woodward* v. *Leavitt*, 107 Mass. 453, a case which involved the admissibility of testimony of jurymen in support of a verdict on a motion for a new trial. That case, as well as *Hewitt* v. *Chapman*, 49 Mich. 4, also cited by the defendant, in which the testimony of jurors in one case was attempted to be used in another to show one of the elements of their verdict in the first case, are obviously not in point.

The court below held that even if the testimony of the defendant's fellow jurors as to her statements and conduct in the jury room were disregarded, there was sufficient other evidence to sustain the conviction. (R. 142–144.) After discussing numerous authorities, including the decision of this Court in *Sinclair* v. *United States*, 279 U. S. 749, 767, *supra*, the court held that even if the evidence

was incompetent it should be assumed that since the case was tried to the court without a jury, the judgment was based only upon the competent evidence (which was ample to support it) and, therefore, that errors in the admission of evidence should be disregarded and the judgment should be affirmed.

VIII

DEFENDANT'S DENIALS DID NOT PURGE HER CONTEMPT

Defendant urges in her supplemental brief (S. Br. p. 5) that her contempt, if any, was purged by the denials in her sworn answer to the petition and by her subsequent testimony at the trial. She stated that at the time of her examination by the trial judge she did not have in mind her employment at the Foshay Company, and that her answers to the questions on the subject of bias were true. This ancient defense of compurgation was not raised by any appropriate action during the proceedings before the District Court, nor presented by assignment of error to the Circuit Court of Appeals. The point was discussed in the opinion of the latter court (R. 136–137), but was not presented in the petition to this Court for a writ of certiorari. Under these circumstances we believe it is not now properly before this Court for consideration. *Burns* v. *United States,* 274 U. S. 328, 336; *Fleischmann Co.* v. *United States,* 270 U. S. 349, 356; *Pennsylvania R. R. Co.* v. *Minds,* 250 U. S. 368, 375; *Gonzales* v. *Buist,* 224 U. S. 126, 130.

Even if the question may be considered, we believe it to be without merit. Whatever may have been the source of the anachronism of compurgation, which as Blackstone said was more favorable to the defendant's liberty than the process of civil contempt in equity, though perhaps no less dangerous to his conscience, such doctrines can not now prevail, even in proceedings of criminal contempt. *Ex parte Savin,* 131 U. S. 267, 278, *supra; United States* v. *Shipp,* 203 U. S. 563, 574, *supra;* 214 U. S. 386; *Swepston* v. *United States,* 251 Fed. 205; *In re Oriel,* 17 F. (2d) 800, 803, 23 F. (2d) 409 (C. C. A. 2d), aff'd, 278 U. S. 358; *Bowles* v. *Laws,* 45 F. (2d) 669 (App. D. C.), certiorari denied, 283 U. S. 841; *In re LaVarre,* 48 F. (2d) 216 (S. D. Ga.); 41 *Harvard Law Review* 51.[6]

In the *Savin case, supra,* the process was expressly denied, and in *United States* v. *Shipp, supra,* this Court said (203 U. S. 574):

> On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law,

[6] Recent decisions of various State courts are to the same effect. *Carson* v. *Ennis,* 146 Ga. 726; *Dale* v. *State,* 198 Ind. 110; *State* v. *District Court,* 10 Pac. (2d) 586 (Mont.); *In re Singer,* 105 N. J. Eq. 220; *State* v. *Keller,* 8 Pac. (2d) 786 (N. M.); *Boorde* v. *Commonwealth,* 134 Va. 625; *Herring* v. *Houston Nat. Exch. Bank,* 113 Texas 337. See also *Huntington* v. *McMahon,* 48 Conn. 174; *Bate's Case,* 55 N. H. 325; *Matter of Snyder,* 103 N. Y. 178; *State* v. *Harpers Ferry Bridge Co.,* 16 W. Va. 864; note, 9 L. R. A. (N. S.), 1120. Cf. *People* v. *Severinghaus,* 313 Ill. 456; *People* v. *Burr,* 316 Ill. 166.

> as is suggested by the propounding of interrogatories and the very phrase, purgation by oath (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole, and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent.

When the *Shipp case* came to this Court a second time reference was made to the prior decision, which was said to be (214 U. S. 405):

> * * * that the answers of the defendants, under oath, disavowing intent did not purge them.

In *Bowles* v. *United States,* 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648, it was said (p. 852):

> Little need be said as to the position of respondent that the contempt was purged by the answer. It is well settled in the federal courts that, with the possible exception of cases where the contempt inheres in the intent with which an ambiguous act is done, a person may not purge himself of the contempt charged by mere denial under oath.

The process of compurgation in defense to a charge of criminal contempt has had no existence in England since 1796 (*Matter of Crossley,* 6 Term Reports 701 [1796]), although not long before that Blackstone, while severely criticizing the process, felt constrained to say that by long and immemorial usage it had become the law of England. (4 *Blackstone,* 288.) While in rare instances the defense has been recognized in some of the inferior Federal courts (see *United States* v. *Dodge,* Fed. Cas. No. 14,975; *In re May,* 1 Fed. 737), there have been no such instances since the decision in the *Shipp case,* and the authorities cited *supra* disclose that whenever the defense has been made since that time in the Federal courts it has been overruled.

We submit that the remnant of this mediaeval anachronism, surviving, if at all, under a precautionary expression in the opinion of this Court in the *Shipp case,* has no place in the practice of the Federal courts. The process was denied in the *Savin case,* and repudiated in the *Shipp case.* If there is anything left of it, it should no longer be permitted to survive in the truncated form in which those decisions have left it. If applicable at all, it would seem to be applicable to all cases of criminal contempt, as it was at common law. (4 *Blackstone* 288.) But this is denied by the decisions of this Court.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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